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No. 792

IN THE

Supreme Court of the United States

October Term, 1968

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JOHN F. DAVIS, CLERK

SAUL I. BIRNBAUM,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING

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The petition for a writ of certiorari in this case was denied on March 24, 1969. The Chief Justice, along with Mr. Justice Douglas, filed a seven page dissent.[1] Mr.

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[1] The Chief Justice summarized his reasons for dissenting as follows (slip op. at 3):

> Certiorari should be granted, I believe, for two reasons that are inescapably clear from this record: (1) the district judge's imposition of a "tentative" sentence clearly violated the principle, inherent in 18 U.S.C. §4208(b) and our decisions dealing with that statute, that a defendant must be given the option of waiting until the tentative sentence becomes final

(Cont'd.)

Justice Marshall "took no part in the consideration or decision of this petition."[2]

The petition, as well as the government's brief in opposition, rested on an assumption of law which petitioner has just learned may very well be erroneous. And it is reasonable to conclude that this Court's decision may also have been premised on the same erroneous assumption.

It will be recalled that the issue raised in the petition for certiorari grew out of remarks made by Judge Cooper to petitioner at the sentencing proceeding held April 1, 1966. Judge Cooper said that he "might" impose probation after the appeal upon a motion under Rule 35 if petitioner gave of his time and money in charitable activities. Both petitioner and the government assumed that Judge Cooper had the *legal power* to do what he said he might do – to impose probation upon a motion under Rule 35. Petitioner has just learned, however, that there is now some question whether Judge Cooper would have been legally empowered to do that. On January 13, 1969, this Court denied certiorari in the case of *Whitfield v. United States,* 401 F.2d 480 (9th Cir.

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[1] (Cont'd.)

before appealing his conviction; (2) the district judge's refusal to suspend sentence, after petitioner fully complied with the conditions laid down for such suspension, is inconsistent "with that regularity and fairness which should characterize the administration of justice in the federal courts." *Saldana v. United States,* 365 U. S. 646, 647 (1961).

[2] Presumably, Mr. Justice Marshall recused himself because of possible prejudice, or appearance of prejudice, resulting from the fact of his having occupied the office of Solicitor General during earlier stages of this case. Petitioner would like to make it clear that he welcomes participation by Mr. Justice Marshall in the consideration and decision of this petition for rehearing.

1968) (Oct. 1968 term, no. 709). In that case, the United States Court of Appeals had decided that "a Rule 35 motion pertains only to the correction or reduction of a sentence; *neither the suspension of sentence nor the granting of probation constitutes the correction or reduction of a sentence.*" 401 F.2d at 482 (emphasis added).[3]

If it is true that Judge Cooper did not have the legal power to impose probation as he said he "might", then the posture of this case changes dramatically. The unfairness, and invalidity, of the original sentencing proceeding is multiplied many times. As the Chief Justice observed in his dissent to the denial of certiorari in this case: "Given his situation, petitioner had no choice but to treat the trial court's remarks as a promise and then proceed, as he did, to comply with its conditions" (slip op. at 6). In complying with these conditions, petitioner underwent substantial "added restraints imposed on his time during the 18 months while the appeal was pending" (slip op. at 5). It is one thing to undergo such restraints where there is a genuine possibility that probation may result; it is quite another thing to be induced to do so where the judge, unbeknownst to petitioner, may not even have been empowered to grant the promised probation.[4] The Court of Appeals in this case characterized Judge

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[3] It is petitioner's position that this conclusion is wrong; petitioner strongly maintains that a Federal judge may, under Rule 35, lawfully reduce a sentence of imprisonment to probation, especially when he has previously said he "might" do so. Petitioner is simply pointing out the contrary view of a United States Court of Appeals which may be—although he thinks it is not— a correct statement of the law.

[4] The Chief Justice recognized that Judge Cooper's statement must be deemed a promise. He said: "I think the circumstances of this case demand at least that *the trial court's promise* be kept and that the prison sentence be reduced to one year's probation" (slip op. at 6; emphasis added).

Cooper's sentencing admonition as "a calculated risk" that Birnbaum undertook in order to avoid "confinement". But if it is true that Judge Cooper was not authorized by law to exercise his discretion so as to free petitioner from confinement, then what petitioner undertook was not "a calculated risk" at all; it was a judicially imposed exercise in futility. Even if Judge Cooper had concluded – as the Chief Justice stated the evidence required him to – that petitioner had fully complied with his conditions, he might still not have been able to "deliver" what he promised. And even if Judge Cooper had imposed probation, the government could have appealed and had his decision reversed as it did in a similar case, *United States v. Ellenbogen*, 390 F.2d 537 (2d Cir. 1968) (also brought to petitioner's attention only recently). In the *Ellenbogen* case, Judge Cooper reduced a sentence of one year and a day to probation, and the Court of Appeals reversed, raising questions about Judge Cooper's power to impose probation under Rule 35.[5]

Petitioner submits that this line of cases, raising doubt about Judge Cooper's legal authority to impose probation in the exercise of his discretion under Rule 35, undercuts the assumption on which the government's presentation to this Court was predicated. It places the case in an entirely new light. Two Justices of this Court were convinced that Judge Cooper "exceeded his authority" (slip op. at 5) and engaged in "a serious departure from accepted judicial behavior" (slip op. at 6). How much clearer is the departure in light of the new development outlined above.

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[5] "We stress the time of sentencing as the appropriate occasion for probation to be considered by the trial judge." 390 F.2d at 543; see also *id.* at 540. In another recent case, *United States v. Coke*, 404 F.2d 836 (2d Cir. 1968), the Second Circuit, *en banc*, reversed Judge Cooper's action in increasing a defendant's sentence after a successful appeal.

Petitioner believes that the Solicitor General ought to have an opportunity to present his views to the Court on this important new issue. In his brief in opposition to the petition for certiorari, the Solicitor General characterized this case as "troublesome", and Judge Cooper's sentencing admonition as "regrettable". How much more troublesome and regrettable this case may now appear to the Solicitor General in light of these doubts whether Judge Cooper could have done what he said he "might" do. Accordingly, petitioner requests this Court to invite the Government to file a reply to this petition for rehearing.

In addition to the new question raised by this recent line of cases, the dissenting opinion of the Chief Justice suggests two important arguments not pressed, but implicit, in the original petition for certiorari. The Chief Justice pointed out that "if the district judge was imposing a one-year prison term, he had no authority to exact, in addition, a lengthy period of probation," namely, "the added restraints imposed on his time during the 18 months while the appeal was pending" (slip op. at 5). The imposition of this double penalty – eighteen months of control over petitioner's life, plus one year in prison – constitutes an impermissible form of double punishment. Indeed, the penalty was in reality a triple one: the year in prison; the eighteen months of control; and the extraction of a "fine" of "over $100,000 in personal funds" (slip op. at 3) (a fine many times in excess of that authorized by the statute).

The Chief Justice also observed that Judge Cooper "happened to change his mind *for reasons known only to him* . . . " (slip op. at 5; emphasis added). But the reasons why Judge Cooper "changed his mind" remain secret because Judge Cooper did not choose to reveal them, and because petitioner was erroneously denied a hearing at which he would have had an opportunity to establish that these "reasons" were wholly improper ones.

Petitioner respectfully requests this court to remand this case to an appropriate district court for a hearing. At such a hearing petitioner would have an opportunity to establish that the Judge was "in fact, vindictive."[6]

Petitioner argued, in his reply brief (at pp. 15-16), that the concededly important "lessons" of this case could not be effectively communicated unless the sentencing decision of the District Court were reversed. This is still true, even in light of the lengthy dissenting opinion of the Chief Justice. This case will still be understood as a six-to-two endorsement of Judge Cooper's "serious departure from accepted judicial behavior" (slip op. at 6). The only way for the Court to assure that this kind of "departure" will not recur is to grant the instant petition. Nor are there any countervailing reasons why the relief requested by petitioner should not be granted. Indeed, considerations of equity and public interest in petitioner's remaining out of jail are greater now than ever. Within the past few weeks, the St. Augustine Episcopal School, of which Petitioner is a leading supporter, was totally destroyed by fire. Although the Mayor of New York City provided temporary quarters for the students, plans must now be made for a new permanent home. Petitioner's involvement in this project is crucial, as it is in the other charitable endeavors in which petitioner continues to be instrumental.

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[6] In the oral argument in *Pearce v. North Carolina* (No. 413, argued February 24, 1969), the following relevant dialogue occurred:

> Q. What would you say if there were proof that the second sentencing judge had been, in fact, vindictive?
>
> A. [By attorney for North Carolina] That would be a flagrant violation of the man's constituional right to appeal.
>
> Q. Of what constitutional right?
>
> A. The constitutional right to appeal without any fear of reprisal . . . ".

In filing this rehearing request, petitioner would like to bring another important new matter to the attention of this Court. Petitioner has recently informed his attorneys that he has reason to suspect that various of his telephone conversations during the course of this case may have been unlawfully overheard by agents of the Government. The record establishes at least one instance of arguably unlawful recording of a telephone conversation between petitioner and Mr. Leonhardt.[7] Accordingly, counsel for petitioner has written to the Attorney General of the United States requesting that he inform petitioner of any other instances of overhearing and/or recording of any of petitioner's conversations.[8] Petitioner will, of course, immediately inform the court of any response received from the Attorney General.

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[7] *United States v. Birnbaum*, 373 F.2d 250 (2d Cir. 1966), Appellant's Appendix (Stipulation).

[8] A copy of the letter is attached as Exhibit A.

CONCLUSION AND RELIEF SOUGHT

For the foregoing reasons, petitioner respectfully requests the Court to invite the Solicitor General to respond to this petition for rehearing and then to grant the petition. Petitioner additionally requests this Court to stay issuance of the mandate pending consideration of this petition for rehearing.

Respectfully submitted,

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April 1, 1969

EXHIBIT A

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April 1, 1969

The Honorable John N. Mitchell
Attorney General of the United States
United States Department of Justice
Washington, D. C. 20530

Dear Mr. Attorney General:

I represent Saul I. Birnbaum, who was convicted of a Federal crime (61 Cr. 991, S.D.N.Y.). An aspect of his case is presently pending before the United States Supreme Court on a petition for rehearing of the Court's denial of a petition for certiorari. *Birnbaum v. United States,* No. 792 (decided March 24, 1969).

Mr. Birnbaum recently informed me that he had reason to suspect that various of his telephone conversations during the course of the investigatory and other stages of his case may have been overheard. The government has disclosed and petitioner knows that at least one telephone conversation between him and a Mr. Leonhardt was overheard and recorded (presumably with the latter's consent).[1] He does not know, however, whether other conversations were overheard and/or recorded either with or without the consent of the other party.

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[1] *United States v. Birnbaum,* 373 F.2d 250 (2d Cir. 1966), Appellant's Appendix (Stipulation).

The Hon. John Mitchell
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In accordance with your policy of disclosing, upon request, any and all instances of wiretapping (or other electronic eavesdropping), I would appreciate your advising me whether Mr. Birnbaum's voice was ever overheard and/or recorded by any agents of the government, either with or without the consent of the other party.[2]

A copy of this letter has been filed with the Supreme Court today in connection with the petition for rehearing referred to above, and I would appreciate your answer as soon as possible.

Sincerely yours,

/s/ Harold F. Reis

Harold F. Reis

HFR/smt

cc: The Honorable Erwin N. Griswold

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[2] Although the United States Supreme Court has never explicitly held that it is illegal for the government to overhear or record a conversation where one party has consented, a recent *en banc* decision of the United States Court of Appeals for the Seventh Circuit has held that, absent a valid warrant, the government may not overhear or record a conversation between two parties where one, but not the other, has consented. *United States v. White*, Nos. 16,021, -22 (decided Jan. 7, 1969). Accordingly, information is requested as to whether the government overheard and/or recorded any such conversation, as well as any conversation where there was no consent by either party.

CERTIFICATE OF COUNSEL

I, Harold F. Reis, hereby certify that the accompanying petition for rehearing is presented in good faith and is not being filed for purposes of delay, and that the petition is restricted to circumstances of substantial or controlling effect which have intervened since the filing of the petition for writ of certiorari in this case.

/s/ Harold F. Reis

Harold F. Reis